IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 24, 2007 Session

STATE OF TENNESSEE v. CHRISTIAN FERNANDEZ

Direct Appeal from the Circuit Court for Sevier County
No. 11065-III Richard R. Vance, Judge

No. E2006-01781-CCA-R3-CD - Filed October 23, 2007

The defendant, Christian Fernandez, entered a conditional guilty plea to possession of cocaine, a schedule II controlled substance, in excess of .5 grams with the intent to sell or deliver, a Class B felony, possession of marijuana, a schedule IV controlled substance, a Class A misdemeanor, and possession of drug paraphernalia, a Class A misdemeanor. He was sentenced to eight years total, to serve one year in jail and the remainder on supervised probation. As part of his conditional guilty plea, the defendant reserved and submitted the following certified question of law: whether the trial court erred in denying the defendant's motion to suppress because the continued detention of the defendant and the subsequent search of his vehicle were conducted without a finding of probable cause or reasonable suspicion of criminal activity. Upon review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

A. Phillip Lomonaco, Knoxville, Tennessee, for the appellant, Christian Fernandez.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Steven R. Hawkins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. FACTS

The following facts are taken from the hearing held on the defendant's motion to suppress:[1] Officer Helen Wright, an Officer with the Pigeon Forge Police Department testified that on September 7, 2004, she encountered and pursued a vehicle on U.S. 441 in Pigeon Forge, Tennessee at approximately 5:00 a.m. traveling eighty-one miles per hour in a thirty-five mile per hour zone. She recalled that she caught up with the vehicle and stopped it in the city of Sevierville, Tennessee. Officer Wright identified the defendant as the driver of the vehicle.

Officer Wright testified that after stopping the vehicle, she approached the vehicle on the driver's side. She asked the defendant why he was speeding, and he replied that he was in a hurry to get back to Florida. Officer Wright stated that she checked the defendant's driver's license, which was valid, and also ascertained that the vehicle was registered to the defendant's parents. Officer Wright returned to her patrol car to issue the defendant a traffic citation.

Officer Wright testified that as she issued the citation, fellow police officer Brad Lowe arrived on the scene and looked into the defendant's vehicle. Officer Wright recalled that Officer Lowe told her that there were ashes in the middle of the car's console that looked suspicious to him. Officer Lowe also expressed concern that the defendant had crossed the highway and pulled over onto a dark side road, when he could have pulled over in a well-illuminated area.

Officer Wright testified that she also noticed the ashes when she approached the vehicle to hand the citation to the defendant. She recalled that the ashes looked as though they had been wiped off of the console. Officer Wright stated that the ashes did not look like cigarette ashes to her, but rather looked "scattered, flat, kind of messed up." She testified that her familiarity with cigarette ash was based on her experience with her spouse who was a smoker. However, she admitted that she did not know what kind of ashes they were. When pressed on cross-examination, Officer Wright stated that she just had a "hunch" and based on her fellow officer's suspicion, she decided to inquire further about the ashes.

Officer Wright testified that she asked the defendant to step out of the vehicle so that she could issue the citation to him. She explained to the defendant that he was receiving a citation for reckless driving. She then handed the defendant the citation. After handing the defendant the citation, she asked him if he had anything illegal in the vehicle. The defendant told her that he had a sword in the trunk of the vehicle. Officer Wright asked the defendant for permission to search his vehicle, and the defendant gave his consent to the search. Officer Wright stated that less than a minute elapsed between handing the defendant the citation and asking him whether he had anything illegal in his vehicle.

Officer Wright testified that after the defendant consented to the search of the vehicle, she informed him that she was going to pat him down for her safety and the safety of her partner. She

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[1] This case is reviewed pursuant to the authority of Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure regarding appeals based on reservation of a certified question of law. The requirements of this procedural rule, and the defendant's satisfaction of those requirements are discussed further in the Analysis section of this opinion.

stated that the defendant was not under arrest at that time. During the pat-down, Officer Wright came across an item that felt like rolling papers for marijuana cigarettes. She recalled asking the defendant directly if he had rolling papers in his pocket, and the defendant admitted that he did. Officer Wright further testified that next to the rolling papers, she felt a small bulge she suspected was marijuana in a baggie Officer Wright asked the defendant if marijuana was located with the rolling papers, and he admitted that he also had marijuana.

Officer Wright testified that she placed him under arrest for possession of marijuana. After placing him under arrest, Officer Wright searched the vehicle. Officer Wright recounted that she found cocaine in the vehicle, along with other items. Officer Wright detailed those items in the police report as a pill in a baggie identified as Temazepam, 15 ML, 16.30 grams of cocaine, digital scales, small bags of the type commonly used for drug resale, and rolling papers. The defendant was placed under arrest for possession of cocaine with the intent to sell or deliver.

After his arraignment, the defendant filed a motion to suppress evidence obtained from the search, arguing that Officer Wright exceeded the scope and purpose of the stop, and detained the defendant longer than necessary to receive a citation for speeding. The trial court held a hearing and denied the defendant's motion to suppress. The defendant entered a conditional guilty plea to the charged offenses, while reserving a certified question of law on the constitutionality of the stop and search. He was sentenced to eight years total, with one year in jail and the remainder on supervised probation.

II. ANALYSIS

Rule 37(b)(2)(I), Tennessee Rules of Criminal Procedure, allows an appeal from a guilty plea in certain cases under very narrow circumstances. An appeal lies from a guilty plea, pursuant to Rule 37(b)(2)(I), if the final order of judgment contains a statement of the dispositive certified question of law reserved by the appellant, wherein the question is so clearly stated as to identify the scope and the limit of the legal issues reserved. *State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988). The order must also state that the certified question was expressly reserved as part of the plea agreement, that the state and the trial judge consented to the reservation, and that the state and the trial judge are of the opinion that the question is dispositive of the case. *Id.* If these circumstances are not met, this court is without jurisdiction to hear the appeal. *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996). The burden is on the appellant to see that these prerequisites are in the final order and that the record brought to the appellate court contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified. *Id.*

An issue is dispositive when this court must either affirm the judgment or reverse and dismiss. *State v. Wilkes*, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984). That is to say that if the appellant's position is correct, there would be no case to prosecute, as there would be no proof to convict. In the case under review, the parties and the trial court certified that the issue was dispositive of the case; however, an appellate court is not bound by the trial court's determination

that an issue is dispositive. *Preston*, 759 S.W.2d at 651; *see also State v. Oliver*, 30 S.W.3d 363, 364 (Tenn. Crim. App. 2000). The court must make an independent determination of the dispositive nature of the question and must deny appellate review if the court determines that the question is not dispositive. *Id.*

The record shows that these requirements have been met. The defendant's guilty plea contains a hand-written statement of the certified question of law with the judge's signature below it. The defendant's reservation of the certified question is also noted in the judgment form by the trial court judge. The certified question is clearly identified and both the state and the trial court consented to the reserving of the certified question. Finally, the certified question is dispositive of this case. A dispositive issue is one where the "appellate court 'must either affirm the judgment or reverse and dismiss.'" *State v. Walton*, 41 S.W.3d 75, 96 (Tenn. 2001)(quoting *State v. Wilkes,* 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984)). In this case, if the police officer arrested the defendant and searched his vehicle without either valid consent or "reasonable suspicion," the evidence against the defendant should be excluded and the guilty pleas entered into by the defendant are nullified. As such, we find that this issue is dispositive.

On appeal, the defendant argues that the continued detention of the defendant and the subsequent search of the vehicle were conducted without a finding of reasonable suspicion of criminal activity. The defendant further argues that all evidence obtained from the search of his person and vehicle after he received the traffic citation should be suppressed, despite his grant of consent to the search of his vehicle, because the initial purpose of the traffic stop terminated after he received the citation.

The findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this court unless the evidence contained in the record preponderates against them. *State v. Ross*, 49 S.W.3d 833, 839 (Tenn. 2001). The trial court, as the trier of fact, is able to assess the credibility of the witnesses, determine the weight and value to be afforded the evidence and resolve any conflicts in the evidence. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence. *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001)(quoting *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000). However, this court is not bound by the trial court's conclusions of law. *State v. Simpson*, 968 S.W.2d 776, 779 (Tenn. 1998). The application of the law to the facts found by the trial court are questions of law that this court reviews de novo. *State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000).

Both the state and federal constitutions protect individuals from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Tenn. Const. art. I, § 7. Therefore, a search or seizure conducted without a warrant is presumed unreasonable and any evidence discovered as a result of such a search is subject to suppression. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997). However, the evidence will not be suppressed if the state proves that the warrantless search or seizure was conducted pursuant to one

of the narrowly defined exceptions to the warrant requirement. *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000)(quoting *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997).

One of these narrow exceptions occurs when a police officer initiates an investigatory stop based upon specific and articulable facts that the defendant has either committed a criminal offense or is about to commit a criminal offense. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Binette*, 33 S.W.3d at 218. This narrow exception has been extended to the investigatory stop of vehicles. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992). In determining whether reasonable suspicion existed for the stop, a court must consider the totality of the circumstances. *Binette*, 33 S.W.3d at 218. A law enforcement officer must have reasonable suspicion supported by specific and articulable facts to believe that an offense has been or is about to be committed in order to stop a vehicle. *State v. Randolph*, 74 S.W.3d 330, 334 (Tenn. 2002). In determining if reasonable suspicion exists, an appellate court must look to the totality of the circumstances and "the officer of course, must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *State v. Yeargan*, 958 S.W.2d 626, 632 (Tenn. 1997) (quoting *United States v. Sokolow*, 490 U.S.1, 7-8 (1989)). This includes, but is not limited to, objective observations, information obtained from other police officers or agencies, information obtained from citizens, and the pattern of operation of certain offenders. *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992) (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)). A court must also consider the rational inferences and deductions that a trained police officer may draw from the facts and circumstances known to him. *Terry*, 392 U.S. at 21. A vehicle stop is constitutional if an officer has reasonable suspicion to believe that a traffic violation has occurred. *State v. Vineyard*, 958 S.W.2d 730, 734 (Tenn. 1997). In determining whether a vehicle stop was constitutionally justified, we look not at the subjective motivation of the stopping officer, but at whether there was in fact reasonable suspicion to believe a violation had occurred. *See Whren v. United States*, 517 U.S. 806, 813 (1996).

A reasonable traffic stop can become unreasonable and constitutionally invalid if the time, manner, or scope of the investigation exceeds the proper parameters. *See Florida v. Royer*, 460 U.S. 491, 500 (1983); *State v. Troxell*, 78 S.W.3d 866, 871 (Tenn. 2002); *State v. Simpson*, 968 S.W.2d at 783. That is, the duration of such a stop must be "temporary and last no longer than necessary to effectuate the purpose of the stop." *Troxell*, 78 S.W.3d at 871. Moreover, the officer's conduct during an investigative stop must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio,* 392 U.S. 1 at 20. "[T]he proper inquiry is whether during the detention the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *Troxell*, 78 S.W.3d at 871. However, "no hard-and-fast time limit exists beyond which a detention is automatically considered too long and, thereby unreasonable." *State v. Justin Paul Bruce*, No. E2004-02325-CCA-R3-CD, 2005 WL 2007215 at *7 (Tenn. Crim. App., Knoxville, Aug. 22, 2005); *see also United States v. Sharpe*, 470 U.S. 675, 685 (1985) ("if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop"). Simply put, a law enforcement officer making a valid traffic stop must not prolong the stop for longer than necessary to process the traffic violation without having some reasonable suspicion of other criminal activity sufficient to warrant prolonging the stop.

It is also well-settled that a search conducted pursuant to voluntary consent is an exception to the requirement that searches and seizures be conducted pursuant to a warrant. *State v. Bartram*, 925 S.W.2d 227, 230 (Tenn. 1996). That is, although the Fourth Amendment and Article I, section 7 of the Tennessee Constitution condemn unreasonable searches and seizures, they recognize the validity of voluntary cooperation. *Florida v. Bostick*, 501 U.S. 429, 439 (1991); *see Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973) (holding that "there is nothing constitutionally suspect in a person [ ] voluntarily allowing a search"); *see also State v. Cox*, 171 S.W.3d 174, 184 (Tenn. 2005). The sufficiency and validity of consent depend largely upon the facts and circumstances presented by each particular case. *State v. Jackson*, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993).

To satisfy the constitutional reasonableness standard, the consent must be "'unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.'" *State v. Simpson*, 968 S.W.2d at 784 (quoting *State v. Brown*, 836 S.W.2d 530, 547 (Tenn. 1992)). Moreover, even if the consent is voluntary, evidence seized in the search will not be admissible if the initial detention was unlawful or thereafter became unreasonable and if the consent was an exploitation of the prior unlawful seizure. *See State v. Garcia*, 123 S.W.3d 335, 346 (Tenn. 2003). "The existence of consent and whether it was voluntarily given are questions of fact" involving an examination of the totality of the circumstances in each case. *State v. Ashworth*, 3 S.W.3d 25, 29 (Tenn. Crim. App. 1999)(quoting *State v. McMahan*, 650 S.W.2d 383, 386 (Tenn. Crim. App.1983)); *see State v. McCrary*, 45 S.W.3d 36, 43 (Tenn. Crim. App. 2000).

In the present case, the defendant was issued a citation by the arresting officer resulting from a valid traffic stop. The defendant was traveling through the city of Pigeon Forge at eighty-one miles per hour in a thirty-five mile per hour zone. Therefore, Officer Wright had sufficient reasonable suspicion to stop the defendant for committing a traffic offense. As the trial court stated, the stop was "reasonable and in furtherance of the officer's responsibility." Indeed, the defendant concedes that the initial traffic stop was valid.

However, the defendant challenges the validity of the subsequent search and arrest on the basis that the purpose and duration of the traffic stop terminated when Officer Wright handed the defendant the citation. Upon review, we first note the short interval of time between Officer Wright handing the defendant the ticket and his grant of consent to search his person and vehicle. Less than a minute elapsed between the time the officer issued the citation and asked the defendant whether he had anything illegal and would consent to a search of the vehicle.[2] The officer's request for consent in this case was sufficiently contemporaneous with the issuance of the citation, such that there was no appreciable delay, and certainly no unreasonable delay.

[2] A videotape of the traffic stop in the present case was attached as an evidentiary exhibit at the Suppression Hearing and included in the appellate record. Upon review, we note that the videotape of the incident supports the interpretation and judgment of the trial court.

In addition, the defendant voluntarily granted consent to search his person and vehicle. The defendant was under no obligation to consent to the search, and Officer Wright exerted no coercion or duress to force him to do so. Had the defendant denied consent, Officer Wright would have had to demonstrate that she possessed "reasonable suspicion" that the defendant was engaged in some form of criminal activity. However, once the defendant consented, all requirements that a showing of reasonable suspicion be made were rendered unnecessary.

Once the defendant was placed under arrest for possession of marijuana, the subsequent search of the defendant's vehicle was based on his consent, and did not require a showing of reasonable suspicion by the arresting officer. The cocaine and drug paraphernalia found inside the car were appropriately and lawfully seized by Officer Wright pursuant to the arrest. Therefore, we find that the defendant is without relief on this issue.

CONCLUSION

Based on the foregoing reasons and authority, we affirm the judgment of the trial court.

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J.C. McLIN, JUDGE